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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL ASSOCIATION OF HOME BUILDERS, *ET AL.*,

Petitioners,

v.

BRUCE BABBITT, SECRETARY, UNITED STATES DEPARTMENT OF INTERIOR, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF AMICI CURIAE THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATION FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Pursuant to Rule 37.2(a) of the Rules of this Court, the Washington Legal Foundation and the Allied Educational Foundation respectfully submit this amici curiae brief in support of the petitioners. Consent to the filing of this

brief has been granted by all the parties, and the consent letters have been lodged with the Clerk.[1]

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center based in Washington, D.C., with supporters nationwide, including many property owners who are subject to civil and criminal penalties of the federal Endangered Species Act.

WLF appeared as an amicus curiae in this case before the court of appeals because it raised serious questions regarding the limits of the power of Congress under the Commerce Clause to regulate traditional state and local land use activity and wildlife management. WLF has also appeared as amicus in numerous cases before this Court raising related questions regarding land use activity and the Endangered Species Act. *See Bennett v. Spear*, 117 S. Ct. 1154 (1997); *Babbitt v. Sweet Home Chapter Communities for a Great Oregon*, 515 U.S. 687 (1995); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and public policy, and has appeared before this Court as amicus curiae in numerous cases along with WLF.

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[1] Pursuant to Rule 37.6, amici state that no counsel for a party in this case authored this brief in whole or in part, and no persons or entities other than the Washington Legal Foundation, its supporters, or counsel, contributed financially to the preparation or submission of this brief.

STATEMENT OF THE CASE

In the interests of judicial economy, amici adopt by reference the Statement of the Case as presented in the petition for writ of certiorari.

In brief, this case raises the important issue of whether there are any limits under the Commerce Clause to regulate private and local land use activities that may affect any federally listed endangered or threatened species (plants or wildlife, including insects), where the connection between that species and interstate commerce is non-existent, speculative, or at best, tenuous.

In this case, the U.S. Fish & Wildlife Service of the Department of Interior, restricted the petitioners from carrying out normal and reasonable local land use activities, including the building of a much needed hospital, because those activities would purportedly disturb the habitat of the Delhi Sands Flower-loving Fly (the "Fly"), a species found only in a small local area of two counties in Southern California. There was no showing that the Fly has or had any commercial value, such as a pollinator of crops sold in interstate commerce, or is likely to have such value in the foreseeable future; rather, its value has been essentially one of limited academic interest.

The federal government invoked its authority over this local land use planning and activity by citing the "take" provisions of the Endangered Species Act, 16 U.S.C. § 1538(a)(1)(B). Under the "take" provisions of the ESA, persons are subject to civil and criminal penalties if they "take" a species, that is, if they "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 U.S.C. §

1532(19). For example, a person who merely chases or "pursues" the Fly, but does not capture it or even intend to capture it, is subject to civil and criminal penalties under the ESA. Indeed, a person who "attempts" to chase one of the flies, can be prosecuted under this federal law.

In a sharply divided opinion, the court of appeals upheld this broad assertion of federal power over local land use activities under the Commerce Clause. Purporting to follow this Court's Commerce Clause jurisprudence, including *United States v. Lopez*, 514 U.S. 549 (1995), Circuit Judge Wald found that the "take" provision of the ESA as applied in this case is constitutional because it "substantially affects interstate commerce" in two ways: 1) "[i]n the aggregate. . . the extinction of species and the attendant decline in biodiversity will have a real and predictable effect on interstate commerce," Pet. App. 54a, and 2) the "taking" of the Fly "substantially affects interstate commerce because it [the "taking"] is the product of destructive interstate competition." *Id.* at 58a.

Judge Henderson concurred for somewhat different reasons, finding that while it cannot be said that the "protection of an endangered species has any effect on interstate commerce (much less a substantial one) * * * the loss of biodiversity itself has a substantial effect on our ecosystem, and likewise on interstate commerce." *Id.* at 68a. Judge Henderson further found habitat protection is within the power of Congress "*insofar as application* of section 9(a)(1) of ESA *here* acts to regulate commercial development of the land inhabited by the endangered species." *Id.* at 71a (emphasis added). Thus, Judge Henderson's *as applied* analysis would depend on the fortuity of the circumstances and nature of the "take". For example, "taking" a Fly in the form of chasing it for the

fun of it, or trampling or riding across the habitat area with destructive results, with no commercial activity at stake or involved in the activity, could not be regulated by Congress under this theory. Presumably, Judge Wald's "destructive interstate commerce" argument is also dependent on the fortuity of the nature of the cause of the habitat destruction -- here, the building of a hospital -- as opposed to "takes" involving non-commercial conduct.

Judge Sentelle vigorously dissented, finding no current or reasonably foreseeable connection between the Fly and interstate commerce. Pet. App. 72a. He further found that the nature of the conduct constituting the "taking" in this or any other case, is not inherently commercial. *Id.* at 84a.[2]

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[2] Judge Henderson disagreed with Judge Wald's conclusion that the Fly could be regulated on the grounds that the ESA regulates the use of "channels of interstate commerce." Pet. App. at 67a. Thus, only the "substantial affects interstate commerce" rationale received two votes below and is the focus of this brief.

Neither Judge Wald nor Judge Henderson found, nor could they, that the Fly could be regulated under the third and final area of the exercise of Congress's Commerce Clause power, namely, that the Fly was an instrumentality of commerce or article of commerce. While the district court upheld the "take" provision in this case in part by finding that Fly was an article of interstate commerce because five specimens of the Fly had once been sold in interstate commerce for $10.00, *see* Pet. App. at 18a, the court of appeals did not even mention this obviously trivial and constitutionally deficient connection between the Fly and interstate commerce.

REASONS FOR GRANTING THE PETITION

The petitioners and their supporting amicus Pacific Legal Foundation have emphasized in their respective briefs that the split in the circuits, as well as split between judges of the same circuit, as to the meaning of this Court's Commerce Clause decision in *United State v. Lopez* are compelling reasons to warrant this Court's review of the judgment below.

While amicus WLF wholeheartedly agrees that those reasons are sufficiently compelling as envisioned by Sup. Ct. Rule 10(a), and while we may cite additional conflicting circuit court opinions in that regard, we believe that review is also warranted under Sup. Ct. Rule 10(c), namely, that the court of appeals "decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

I. THE COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT CONFLICTS WITH THIS COURT'S COMMERCE CLAUSE JURISPRUDENCE

There can be no doubt that the question decided by the court below was an important question of federal law, namely, the constitutionality of the "take" provision of the Endangered Species Act. That provision affects literally millions of property owners, including state and local governments, and millions of acres of private and nonfederal land. The court of appeals' decision also conflicts with this Court's teachings on the Commerce Clause.

In *United States v. Lopez*, 514 U.S. 549 (1995), this Court recognized that its prior Commerce Clause jurisprudence had not been clear as to whether the regulated intrastate activity must "affect" or "substantially affect" interstate commerce in order to constitute a legitimate exercise of Congress' limited and enumerated power under the Commerce Clause. Chief Justice Rehnquist, speaking for the *Lopez* Court, concluded that "the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." *Id.* at 559. In so doing, Chief Justice Rehnquist essentially adopted his concurring opinion in *Hodel v. Virginia Surface Mining & Reclam. Ass'n*, 452 U.S. 264, 313 (1981) (Rehnquist, J., concurring) where he was careful to note the limits that the Commerce Clause places on the power of Congress:

> [I]t would be a mistake to conclude that Congress' power to regulate pursuant to the Commerce Clause is unlimited. Some activities may be so private or local in nature that they simply may not be *in* commerce. Nor is it sufficient that the person or activity reached have *some* nexus with interstate commerce. Our cases have consistently held that the regulated activity must *have* a *substantial* effect on interstate commerce. *E.g.*, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S., at 37, 57 S. Ct., at 624 (local activities may be regulated if they *have* a "close and substantial relation to interstate commerce"). Moreover, simply because Congress may conclude that a particular activity substantially *affects* interstate commerce does not necessarily make it so. * * * In short, unlike the reserved police powers of the States, which are plenary unless challenged as

> violating some specific provision of the Constitution, the connection with interstate commerce is itself a jurisdictional prerequisite for any substantive legislation by Congress under the Commerce Clause.

Id. at 310-11 (1981) (Rehnquist, J., concurring) (footnote omitted) (emphases in original).

Unlike the as-applied challenge presented in the case at bar, *Hodel* involved a facial challenge of the provisions of the Surface Mining Act that regulated a particular kind of local or intrastate land use -- surface coal mining -- which produces "a commodity that moves in interstate commerce." 452 U.S. at 283. Thus, as an initial observation, Judge Wald's characterization of *Hodel* as a case not involving an activity that is "commercial in character" is simply wrong. *See* Pet. App. 59a.

But even in sustaining Congress' power to regulate a clearly economic activity, then-Associate Justice Rehnquist was forced to opine: "there can be *no doubt* that Congress in regulating surface mining has stretched its authority [under the Commerce Clause] *to the 'nth degree.'*" *Id.* at 311 (emphasis added). The court below in the instant case ignored the clear guidance of *Lopez*, stretched the limited power of Congress under the Commerce Clause well beyond the "nth degree," and well beyond even *Wickard v. Fillburn*, 317 U.S. 111 (1942), which the *Lopez* Court characterized as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity." 514 U.S. at 560.

In this case, the court of appeals seemed to regard the regulations in *Wickard* and *Hodel* as being within the

heartland or core of Congress's Commerce Clause power, rather than being at its outermost edges, and moved on from there. Amici submit that the "biodiversity" theory of hypothetical interstate commerce is well beyond "the nth degree" of Congress's power, and pushes the Commerce Clause envelope into ethereal realms.

The court below erred by misapplying *Lopez*'s basic teachings as to when, whether, and how to aggregate the economic impact of the conduct that is subject to federal regulation. If aggregation is allowed, and only if the aggregate result demonstrates that there is a "substantial effect on interstate commerce," then the regulation would be upheld under the Commerce Clause. *Lopez* made clear that the prerequisite inquiry is whether the law regulated "intrastate *economic* activity." *Id.* at 559 (emphasis added) (citing to, *inter alia*, *Hodel v. Virginia Surface Mining & Reclam. Ass'n, Inc.*, 452 U.S. 264; *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Perez v. United States*, 402 U.S. 146 (1971) and even *Wickard v. Filburn*, 317 U.S. 111 (1942)). In striking down the gun possession law in *Lopez*, the Court said that since gun possession has nothing to do with commerce, and is not "an essential part of a larger regulation of *economic* activity," the law could not be sustained under the Court's cases "upholding regulation of [intrastate] activities that arise out of or are connected with a *commercial transaction*, which viewed in the aggregate, substantially affects interstate commerce.'

Thus, the impacts of the local activity may be aggregated for Commerce Clause purposes only where the regulated intrastate activity is an economic or commercial one, or, if it is not an economic activity, then aggregation is permissible only where the non-economic intrastate activity is "an essential part of a larger regulation of

economic activity." If neither of these two scenarios are presented, then no aggregation may occur; the regulated activity by itself must have a "substantial effect" on interstate commerce in order to be a legitimate exercise of congressional power under the Commerce Clause.

In this case, the "take" provisions are directed neither at economic activity nor non-economic activity constituting an essential part of a "larger regulation of economic activity" as Judge Sentelle properly observed. Consequently, the court of appeals erred by aggregating the economic effects of the taking of all endangered species, including wildlife, plants, and insects, in order to show a substantial effect on interstate commerce.

Amici submit that even if activity regulated by the "take" provision of the ESA is an economic or commercial activity -- or a non-economic activity that is an essential part of a larger regulation of economic activity -- the relevant class of activities is not the taking of all endangered wildlife as the lower court concluded, or all insects, but, at most, the taking of all Flies in the State of California.

What is clear is that in as-applied challenges such as this one, courts examine the interstate commerce effect that the particular regulated land use activity has on the protected resource. In *Hodel v. Virginia*, 452 U.S. 264 (1981), this Court stated that it "*agree[d] with the lower courts that have uniformly found* the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." 452 U.S. at 282 (citing cases, *id.* at n.21) (emphasis added). Judge Wald cited

only to a portion of this passage in *Hodel*; she conveniently failed to quote and consider the italicized language above referencing relevant lower court decisions in this area. *See* Pet. App. at 59a.

For example, in *United States v. Byrd*, 609 F.2d 1204 (7th Cir. 1979), one of the cases favorably cited in *Hodel*, the Seventh Circuit, in an as-applied challenge, examined whether Congress had authority under the Commerce Clause to regulate certain land use activity (the filling of wetlands adjacent to waterbodies) involving a natural resource that was wholly intrastate, namely, an intrastate lake.

The *Byrd* court made a factual finding that the destruction of those particular wetlands adjacent to Lake Wawasee in Indiana could likely have a "*substantial economic* effect on interstate commerce" because the lake currently attracts numerous interstate travelers for fishing and swimming. *Id.* at 1210 (emphasis added). Lake Wawasee is a "2,500 to 3,000 acre fresh water lake [approximately four square miles] used by interstate travelers and seasonal residents for water-related recreational purposes." *Id.* at 1205. "Destruction of all or most of the wetlands around Lake Wawasee...could significantly impair the attraction the lake holds for interstate travelers by degrading the water quality of the lake, thereby indirectly affecting the flow of interstate commerce." Thus, while the interstate commerce effects were indirect, they were nevertheless found to be "substantial."

Significantly, the *Byrd* court did *not* aggregate the economic effects of the regulated activity with respect to all waterbodies in the United States, or the smaller class of all

intrastate lakes in the United States, or even the still smaller class of all intrastate lakes in Indiana; rather, the court focused its analysis on the particular "endangered" intrastate lake in question.

In *Utah v. Marsh*, 740 F.2d 799 (10th Cir. 1984), the court was similarly faced with an as-applied Commerce Clause challenge to local land use activities that affected Lake Utah. The Tenth Circuit, noting *Hodel*'s language approving the analysis of *Byrd* and similar environmental cases, properly focused its analysis on the interstate commerce effect of the lake in question rather than a larger class of waterbodies. "Lake Utah is the largest freshwater lake in the State of Utah, with a surface area of approximately 150 square miles." *Id.* at 803. The Tenth Circuit found that the discharge of fill directly *into* Utah Lake "could well have a *substantial* economic effect on interstate commerce" because of its widespread use by interstate travelers and other interstate impacts.[3]

Based on this *site-specific* approach, it is clear that the interstate commerce effect of a "take" of the Fly is non-existent or trivial compared to the impact in the *Byrd* and *Marsh* cases. What is the economic effect on interstate commerce of the taking of a Fly or all the Flies in this case? If the "take" consists only of chasing after or

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[3] The court noted that "non-resident visitation at the lake averaged 6,919 persons per year" who came to hunt, fish, etc., and because waters from the Lake are used for irrigation of crops sold in interstate commerce, as well as to support "the State's most valuable warm water fishery which markets most of the catch out of state." *Id.* at 803.

"pursuing" one or even all of the adult Flies, no economic effect is apparent, let alone the requisite *substantial* one on interstate commerce.

But even if the "take" activity is such that the Flies are so harmed that the population is reduced further, or the Fly becomes extinct in a few years, the economic effect is, at best, minuscule. There is no known commercial value of the Fly. All we are told by Judge Wald is that "it is not beyond the *realm of possibility* that the genes of a wild pollinator species like the Fly *might* be inbred with the honeybee, which currently pollinates most major U.S. crops, to produce a pollinator that is more disease resistant." Pet. App. at 52a. Judge Wald tries to dress up this hypothetical and unknown use of the species in economic terms, referring to it as having an "option value," Pet. App. at 53a, and therefore, justifies the assertion of federal jurisdiction over the species because of its possible economic value. But the mere stating of this "realm of possibility" or "crystal ball" theory of the exercise of commerce clause power reveals at once that it is unprincipled and has no real limits.

Surely, the *Byrd* and *Marsh* courts, the former case cited with approval by this Court in *Hodel*, would not have found the intrastate lakes in those cases to have a "substantial effect on interstate commerce" if the evidence showed that only two or three interstate visitors came there over a period of several years. Yet under Judge Wald's novel "realm of possibility" theory of interstate commerce power, it was not even necessary to show that *anyone* ever visited these intrastate lakes because it was within the "realm of possibility" that somebody, someday, might do so. In short, the vague and open-ended "realm of possibility" standard by which courts are to judge the

permissible reach of Congress's exercise of its limited and enumerate Commerce Clause power is no standard at all.

II. THE COURT OF APPEALS DECISION DOES VIOLENCE TO FUNDAMENTAL PRINCIPLES OF FEDERALISM AS ARTICULATED BY THIS COURT

The decision of the court of appeals violates the fundamental principles of federalism embodied in the Tenth Amendment of the Constitution and applied in Commerce Clause challenges to federal regulation over matters that are primarily local in nature.

A. Local Land Use Activity

As this Court made clear in *United States v. Lopez*:

> the scope of the interstate commerce power 'must be considered in the light of our dual system of government and *may not be extended so as to embrace effects upon interstate commerce so indirect and remote* that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'

514 U.S. at 557 (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)) (emphasis added).

The "biodiversity/realm of possibility" rationale adopted by the court below is even more tenuous than the "indirect and remote" effect upon interstate commerce condemned in *Lopez*. Furthermore, the regulation of local land use activities and zoning has long been the province of

the States and their political subdivisions. *See, e.g., Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Village of Belle Terre v. Borass*, 416 U.S. 1, 13 (1974) (zoning "may indeed be the most essential function performed by local government") (Marshall, J., dissenting); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 950, 956 (1982) ("a State's power to regulate the use of water for the purpose of protecting the health of its citizens * * * is at the core of its police power").

When federal legislation such as the "take" provision of the ESA impinges on local land use, this Court has been especially sensitive to those concerns. For example, in *Hodel v. Indiana*, 452 U.S. 314 (1981), the Court addressed the impact of regulating strip mining, a commercial enterprise, on local land use:

> We also do not share the view of the District Court that the Surface Mining Act is a land-use measure *after the fashion of the zoning ordinances typically enacted by state and local governments*. The prime farmland and other provisions at issue in this case are concerned with regulating the conditions and effect of surface coal mining. Any restriction on land use that may be imposed by the Act are *temporary and incidental* to these primary purposes. The Act imposes no restriction on postreclamation use of mined lands."

Id. at 330 n.18 (emphasis added).

By sharp contrast, the "take" provision of the ESA as applied to the Fly is indeed designed after the fashion of land-use measures like zoning. The ESA essentially requires that the owner of the property keep some or all of it in its natural state as a habitat for a threatened or

endangered species for the indefinite future. This federal regulation thus constitutes a drastic example of confiscatory downzoning. Unlike the Surface Mining Act which *Hodel* found to impose "no restrictions on postreclamation use" of the land, the ESA imposes very severe restrictions as amply documented by the petitioners in this case, such as the problems encountered with the building of a county hospital, the prevention of housing development, interfering with highway use and traffic control, and similar land use restrictions, costing the local taxpayers millions of dollars all in the name of the Fly. Those millions of dollars could have been spent on health care, education, housing, and other pressing *human* problems in the community.

Furthermore, the *Hodel* Court repeatedly emphasized that the mining law regulates only "private individuals and businesses"; in this case, the "take" provisions regulate political subdivisions of the State of California, even including land owned by the State and local governments. Once an endangered or threatened species is listed, the designation of critical habitat under the ESA effectively imposes a federal zoning overlay onto local zoning maps. *Cf. Lopez* at 583 (Kennedy, J.) (1,000-foot gun-free buffer zones around schools makes it "difficult to navigate without infringing on those zones").

Clearly, the "take" provisions as applied to the Fly have had a dramatic and disruptive impact on local land use and planning, and thus, violate important principles of federalism.

B. State Regulation of Wildlife on Private and Nonfederal Lands

In addition to local land use planning and zoning, it is clear that the States have long asserted their authority over the regulation of wildlife. While the States do not literally "own" the wildlife within their borders, it is also "clear that the States have a substantial proprietary interest -- sometimes described as 'common ownership,' *Geer v. Connecticut*, 161 U.S. 519, 529 (1896) -- in the fish and game within their boundaries." *Douglas v. Seacost Products, Inc.*, 431 U.S. 265, 288-87 (1977) (Rehnquist, J., concurring in part and dissenting part). After surveying Supreme Court decisions on the subject up to 1960, then-Associate Justice Rehnquist concluded that "the cases are consistent in recognizing that the *retained interests of States* in such common resources as fish and game are of substantial legal moment, whether or not they rise to the level of a traditional property right." *Id.* (emphasis added).

States also had a common law right to seek recovery against private parties for polluting natural resources found within a state which has now been codified by legislation in most states. *See* Halter and Thomas, *Recovery of Damages by States for Fish and Wildlife Losses Caused by Pollution*, 10 Ecol. L. Q. 5 (1982); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973).

Against this substantial history of the States' consistent exercise of their traditional police powers regulating wildlife, the federal government began to legislate in this area only at the beginning of this century and in a very limited way when Congress enacted the Lacey Act.

> While the Lacey Act inaugurated significant federal legislation touching wildlife found within the states, by its terms the act *expressed great deference to the leadership of state law.* No federal crime was committed by properly labeled interstate shipment of any animal except those taken in violation of state law. As to species not then protected by state law, including various endangered species, the federal legislation posed no impediment whatever to taking. Through its identification of a violation of state law as an operative fact for the commission of a federal crime, federal law continued to give highest priority to those species most valued by state law, sporting wildlife.

Thomas A. Lund, *American Wildlife Law* 87 (1980) (emphasis added). It was not until relatively recently that Congress began to legislate in the area of endangered species protection. The Endangered Species Preservation Act of 1966, Pub. L. No 89-669, 80 Stat. 926 (repealed 1973), and the Endangered Species Conservation Act of 1969, Pub. L. No 91-135, 83 Stat. 275, focused on federal land acquisition authority for habitat and importation bans of endangered wildlife. There was no prohibition of the taking of endangered species, "preferring instead to leave [undisturbed] the *traditional authority of the states* to regulate the taking of resident wildlife." Bean, *The Evolution of National Wildlife Law* 330 (1983) (rev. ed.) (emphasis added).

The recognition by the federal government of the State's authority over wildlife within their borders abruptly changed in 1972 when the current version of the Endangered Species Act was passed with the current "take"

provision. For the first time in United States history, federal law would henceforth govern over State law as to the management and protection of certain wildlife on private and nonfederal land.

More significantly, the ESA not only regulates traditional wildlife, it also regulates plants and insects, as evidenced by the Fly in this case. But as one commentator recognized, "Because common law has never treated plants [or insects] as occupying the same conceptual status as wild animals, in terms of their susceptibility to private ownership, there may be a major constitutional impediment to prohibiting their taking on nonfederal lands." Bean, *supra*, at 345, n.127. Amici agree.

This case is not about the wisdom of protecting endangered species, but about the proper exercise of federal power to advance that interest. If the judgment of the court of appeals is reviewed and overturned, the Fly will not become extinct. There are numerous ways to protect the Fly in this case that are more respectful of the Constitution and federalism, such as a captive breeding program (which has been planned for the Fly), or the not uncommon practice of purchasing of the habitat either outright by the government or private conservation groups, or through the purchase of conservation easements.

Congress is also free to encourage the States to protect endangered local species such as the Fly by withholding certain federal funds if the States fail to protect the species. This practice is constitutionally permissible so long as the withholding of funds does not become so coercive as to result in compulsion. *See South Dakota v. Dole*, 483 U.S. 203 (1987).

If the judgment below is left unreviewed, there would be no limit to Congress's power over wildlife found only within the borders of a State. For example, the federal government could easily determine what the deer hunting season should be in Maine or Virginia; indeed, Congress could regulate or ban the hunting or fishing of any local species altogether, endangered or not.

CONCLUSION

As one author candidly acknowledged in a study funded by the National Wildlife Federation: "Since ecologists contend that all forms of life are interdependent, this theory [of indirect connection of wildlife to interstate commerce] might at its logical extreme support federal legislation with regard to everything that is alive." Lund, *American Wildlife Law* 50 (1980). This is precisely the "biodiversity/realm of possibility" theory espoused by the court below.

This Court in *Lopez* made it clear that its decision, at a minimum, amounted to a firebreak that was to check Congress's eagerness to disregard its limited power under the Commerce Clause when it federalizes and criminalizes any and all conduct for politically expedient or even noble reasons. The court of appeals decision, if allowed to stand, would make the *Lopez* decision appear to be only a quaint and quirky decision that is easily circumvented and does not impose any real limits on the exercise of federal power over traditionally local matters and intrastate activity.

For the foregoing reasons and those stated by the petitioners, the petition for writ of certiorari should be granted.

Respectfully submitted.

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